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Supreme Court of the United States.

OCTOBER TERM, 1977.

No. 77-152

BETH ISRAEL HOSPITAL,

PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,

RESPONDENT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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ON APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Beth Israel Hospital prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Opinion Below.

The Opinion of the Circuit Court is reported at 554 F. 2d 477, 95 LRRM 2230. A copy of this opinion is appended hereto. *See* Appendix C *infra*. The Opinion of the National Labor Relations Board is reported at 223

NLRB No. 188 (1976). A copy of this opinion is appended hereto. *See* Appendix B *infra.*

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on April 29, 1977. The jurisdiction of the Court is invoked under 28 *U.S.C.* § 1254(1).

Applicable Statutory Provisions.

The relevant provisions of the *National Labor Relations Act,* as amended (61 Stat. 136, 73 Stat. 519, 29 *U.S.C.* § 151 *et seq.*) are set forth in Appendix A *infra.*

Questions Presented.

I. Whether the National Labor Relations Board can continue to adhere to a policy regarding solicitation and distribution in a hospital setting which unduly ignores the rights and well-being of hospital patients.

II. Whether a hospital can be held to have committed unfair labor practices by having enforced a rule promulgated in recognition of its responsibility to its patients.

Statement of the Case.

Beth Israel Hospital (hereinafter referred to as the "Petitioner" or the "Hospital") is a nonproprietary hospital located at 330 Brookline Avenue, Boston, Massachusetts. It is an employer within the meaning of the *National Labor Relations Act* (hereinafter referred to as the "Act"). The Petitioner employs approximately 2,200 employees excluding house staff, attending physicians, students and Harvard employees who work on the premises.

On October 29, 1974, an unfair labor practice charge was filed against Petitioner by Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO (hereinafter referred to as the "Union"), a labor organization within the meaning of the Act.

In substance the complaint, dated February 21, 1975, charged the Hospital with violating Section 8(a)(1) of the Act by initiating, promulgating and maintaining a written rule prohibiting distribution of union literature and solicitation except on a "one-to-one" basis in the facility's cafeteria and coffee shop; and Sections 8(a)(1) and 8(a)(3) by issuing oral and written warnings to Ann Schunior, an employee, threatening her with dismissal if she continued to distribute literature in the cafeteria of the Hospital. The Petitioner denied that it had engaged in conduct violative of the Act. Subsequently, the Hospital modified its rules to prohibit one-to-one solicitation in the cafeteria and coffee shop, "with the hope and expectation that the Board for the first time would delineate legal parameters for valid no solicitation and no distribution rules in public areas of nonproprietary hospitals" (Brief in Support of Exceptions filed by Petitioner, p. 19). On April 9, 1975, the complaint was amended charging the Hospital with violating Section 8 (a)(1) of the Act by initiating, promulgating and maintaining a written rule prohibiting solicitation in the facility's cafeteria and coffee shop, an allegation similarly denied by Petitioner in its amended answer.

The no-distribution, no-solicitation rules in effect at the date of the hearing before the Administrative Law Judge are set forth below:

> There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting

and the distribution of literature to Beth Israel employees may be done by other Beth Israel employees when neither individual is on his or her working time, in employee-only areas — employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital, including patient-care and all other work areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.

Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.

Consistent with our long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital.

A hearing was held before Administrative Law Judge, Ivar H. Peterson, who ruled that the Hospital had committed the alleged unfair labor practices, and the Hospital seasonably filed exceptions to his decision. The Board affirmed the rulings, findings, and conclusions of the Administrative Law Judge. Decision reported at 223 NLRB No. 188, 92 LRRM 1078 (1976). The Board found that Petitioner had committed an additional Section 8 (a)(1) violation by maintaining an overly broad no-solicitation, no-distribution rule prohibiting all solicitation and distribution in all areas to which patients, employees and visitors have access during non-working time other than *immediate patient care areas.* The Board cited *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB No. 182, 91 LRRM 1333 (1976), decided subsequent to the Administrative Law Judge's decision in the case at bar,

as authority for this conclusion. Except for a technical modification, the Board adopted the Administrative Law Judge's recommended Order in its entirety.

Upon the Board's petition for enforcement, the United States Court of Appeals for the First Circuit under the authority of Section 2112 of Title 28 of the United States Code enforced the Board's order. *NLRB v. Beth Israel Hospital,* 554 F. 2d 477.

Reasons for Granting the Writ.

I. A conflict exists between the rule followed by the United States Court of Appeals for the Tenth Circuit and that applied by the First Circuit in this case. This Court should exercise its supervisory powers to resolve this conflict.

On July 14, 1977, the United States Court of Appeals for the Tenth Circuit, in an as yet unreported decision, denied enforcement in pertinent part of the Board's order rendered in *St. John's Hospital & School of Nursing, Inc.,* 222 NLRB No. 182, 91 LRRM 1333 (1976), *enf. denied* in part and granted in part, Dkt. No. 76-1130 (10th Cir. July 14, 1977). In that case the Board had established that rules barring solicitation in areas of a hospital other than immediate patient care areas are presumptively invalid. It was the *St. John's* rule which formed the basis for the Board's order against Petitioner herein, and the First Circuit relied upon the *St. John's* doctrine in enforcing that order.

The Tenth Circuit denied enforcement of the Board's order insofar as it would permit solicitation and distribution in patient access areas. In *Beth Israel* arguments were made before the Court as to the detrimental effects of solicitation and distribution on patients and visitors constituting a special circumstance sufficient to rebut the presumption of invalidity of the rule banning solicitation

and distribution in patient access areas of the Hospital, specifically its cafeteria and coffee shop. The First Circuit agreed with the Board that Beth Israel had not met its burden of proof in this regard. In *St. John's* the Board conceded these detrimental effects and held that, "[t]his recognition of the unsettling effects of solicitation on patients must be viewed as establishing a 'special circumstance, making at least some restrictions on solicitation necessary to maintain efficient and orderly operations. Once this special circumstance is established, even under the Board's rationale, the presumption of illegality, is rebutted . . . ." *St. John's* at 12. The Tenth Circuit further held that: "[o]nce it is admitted that union solicitation is disruptive of the tranquil atmosphere essential to the Hospital's primary function of providing quality patient care and may be unsettling to patients who are seriously ill and thus in need of quiet and piece of mind, it is unreasonable to conclude that these adverse effects of union solicitation will occur in some patient access areas but not in others. As demonstrated above such a distinction is totally unsupported by the record evidence and involves medical and administrative judgments outside the Board's acknowledged area of expertise. *St. John's* at 11.

With the decision of the Tenth Circuit, a direct conflict has arisen between that decision and the First Circuit decision in the case at bar. This Court has traditionally exercised its discretionary jurisdiction to resolve such direct conflicts between inferior tribunals, and should certainly do so here to resolve the uncertainty regarding this important aspect of labor relations law.

II. The First Circuit in giving force and effect to a policy of the Board which impairs the ability of hospitals to provide complete medical care and which infringes on the rights of innocent third parties has decided an important question of federal law which has not been, but should be, settled by this Court. The issue is of utmost importance in the administration of the National Labor Relations Act.

The decision of the First Circuit in this case brings to the attention of this Court the need for exercise of its supervisory powers to decide a matter of substantial importance to the public. It is left to this Court to formulate guidelines to govern the question of solicitation and distribution of union literature in a hospital and its environs so as to insure that the rights of innocent third parties, hospital patients and their visitors, are no longer ignored as they have been by the Board. There is no need to recite the many serious problems involved in the health care system in the United States at this time. Suffice it to say that the policy of the Board in formulating solicitation and distribution rules which focus solely on the needs of employer and employees, giving little heed to the rights of sick persons to quality health care, provided in accordance with sound medical judgment, merely exacerbates the frustration of the public in its quest for competent and affordable health care.

Section 7 of the Act grants employees a twofold statutory right, the right to engage in or refrain from self-organization. This two-edged guarantee is protected by Sections 8(a)(1) and 8(b)(1) of the Act. In addition to employee rights, the Act recognizes the right of an employer to control the use of its property to maintain order and discipline in its business establishment. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). The Board and the courts attempt to maintain an accommodation between employee-employer rights with as little "destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

In determining the accommodation required to be made by the Board and the courts between employee and employer rights, it is imperative to recognize that the rights of a third party, namely, the patient, must be taken into consideration. Every new employee at Beth Israel Hospital is given a copy of the pamphlet, "Your Rights as a Patient at Beth Israel Hospital." Additionally employees are made aware of such a publication in employee meetings and in the employee newsletter. The widespread dissemination of the "Patients Rights" pamphlet and the explanation of the contents therein to employees demonstrates that patients too have rights which must be taken into account in the weighing process.

The Board has developed rules as basic postulates to be applied in testing the propriety of no-solicitation, no-distribution rules. Employees may be prohibited from soliciting during working time and from distributing literature in working areas during working and non-working time. *Seng Co.*, 210 NLRB No. 129, at 936, 86 LRRM 1372 (1974). A rule forbidding distribution by employees in non-working areas during non-working time is presumptively invalid, and a rule prohibiting union solicitation by employees during non-working hours is presumptively invalid, even if limited to working areas. *Stoddard-Quirk, Manufacturing Co.*, 138 NLRB 615, 51 LRRM 1110 (1962). A presumptively invalid rule may become proper if the employer can demonstrate "special circumstances" to justify its promulgation and enforcement.

In the present case, the Board refused to consider as a special circumstance the fact that patients frequenting the cafeteria and coffee shop could be disturbed by union solicitation and distribution activity thereby justifying the promulgation and enforcement of Petitioner's rules banning such activity in those areas. The Board found that Petitioner failed to meet its burden of establishing the

existence of special circumstances sufficient to rebut the presumptive invalidity of its rule as applied to the cafeteria and coffee shop. The decision, in the case at bar, enforced by the First Circuit, not only flies in the face of good common sense, but also is at odds with the Board's own position in *St. John's* where it concedes the detrimental effects of solicitation and distribution on patients. *St. John's* at 14, n.7. The decision in *Beth Israel* represents an abandonment of the responsibilities conferred upon the Board by Congress when it extended the coverage of the Act to employees of all health care institutions in 1974. Pub. L. No. 93-360, 93d Cong. 2d Sess. (July 26, 1974), 29 *U.S.C.* § 152(2) and (14). Congress, in enacting the 1974 Health Care Amendments, acted not only in recognition of the interests of hospital employees, but it is clear that Congress was also concerned with a patient's well-being in a health care institution, a fact made plain by examination of the relevant legislative history. *See, e.g.*, Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974 (hereafter "Legislative History"), Pub. L. No. 93-360 (S. 3203), prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate pp. 10, 13. *See generally,* Hearings on H.R. 11357 Before a Subcomm. of the Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. (1972); Hearings on H.R. 11357 Before a Subcomm. of the House Comm. on Educ. and Labor, 92d Cong., 1st and 2d Sess. (1972).

The following comments in the legislative history of Public Law 93-360 confirm this analysis of Congressional concern:

> "In the Committee's deliberation of this measure it was recognized that the needs of patients in health care institutions required special consideration in the

> Act. . . ." Senate Report 93-766, Legislative History, p. 11.
>
> "Many of the witnesses before the Committee, including both the employee and the employer witnesses, stressed the uniqueness of health care institutions. There was a recognized concern for the need to avoid disruption of patient care whenever possible." Senate Report 93-766, Legislative History, p. 13.

Congress allowed for organization and representation of health care employees only upon the expectation that the Board would take care to safeguard the rights and interests of patients. It is clear from the decisions of the Board in *St. John's Hospital & School of Nursing, Inc., supra,* and in other cases such as this one, decided in accord with *St. John's,* that that expectation was unjustified. The Board has abdicated its position as protector of the innocent third party. By limiting the scope of rules barring solicitation to immediate patient care areas only, the Board has exhibited its lack of sensitivity to the special concerns involved in providing medical treatment. Rather than give special attention to the rights of hospital patients, the Board has refused to accord them even the same rights as have been given to customers in a department store or to patrons in a restaurant.

In department stores and similar retail businesses it has been held that solicitation in the store's public areas, such as selling floors, elevators, corridors, and public restaurants, where employees and customers interact, may be forbidden at all times. *Marshall Field & Co.*, 98 NLRB 88 (1952), *enf.*, 200 F. 2d 375 (7th Cir. 1952). The reason for the exception to the general rule is that solicitation "where customers are normally present *might conceivably* be disruptive of the respondent's business" (emphasis added). *May Department Stores Co.*, 59 NLRB 976 (1944), *enf. as mod.*, 154 F. 2d 533 (8th Cir. 1946), *cert. denied,* 329 U.S. 725 (1946).

In a restaurant setting the Board has held that a no-solicitation rule enforced by an employer on a public restaurant's premises did not violate the Act "since under the circumstances union solicitation in the restaurant *is as apt* to disrupt the employer's business as is such solicitation carried on in any other part of the store in which customers are present" (emphasis added). *Goldblatt Bros., Inc.*, 77 NLRB No. 24, at 1262, 22 LRRM 1153 (1948). A ban on solicitation limited to *public* areas of a restaurant, such as customer or sales areas, during working or non-working time is valid (emphasis added). *See Marriott Corp. (Children's Inn)*, 223 NLRB No. 141, 92 LRRM 1028 (1976).

Another decision of the Board involving a restaurant situation, *Bankers Club, Inc.*, 218 NLRB 22, 89 LRRM 1812 (1975), amply illustrates the approach adopted by the Board when the third parties involved are diners. In an opinion approved by the Board, the Administrative Law Judge stated:

> The Board has long approved employer rules prohibiting all solicitation, even during employees' non-working time, in the selling areas of stores and other establishments, such as restaurants, on the theory that such activity might *tend* to drive away customers.
>
> • • •
>
> In the cases of restaurants or other establishments where customers are present it is their presence and the *likelihood* of their being exposed to union activities that creates the "special circumstances" that justify infringing on employees' basic rights.

Id. at 27 (emphasis added). In regard to distribution, the same considerations held sway:

> [L]iterature in the customer area not only might create a litter problem, but might also antagonize customers who find and read a discarded copy. Whatever short-or-long run ill effects on customer appetite or patronage might flow from a flyer advocating a boycott of lettuce or grapes, not to mention one attacking Respondent's labor policies — with or without recommendations — I cannot say, but *Respondent should not have to bear the risk* of any when there are other areas for distribution in the restaurant. I find that the no-distribution portion of the rule is not overly broad and illegal.

Id. at 27 (emphasis added).

A policy which permits no-solicitation rules where the activity *might* upset retail customers or restaurant patrons but which prohibits such rules unless a harmful effect upon sick persons is actually shown hardly reflects a recognition by the Board of the concerns expressed by Congress in permitting the Board to assume jurisdiction over hospital employees.

More restrictive no-solicitation, no-distribution rules are necessary in a hospital cafeteria and coffee shop in order to avoid the disturbance of the hospital's relationship with its patients in the course of providing health care. The Hospital contends that the retail store analogy is applicable in that solicitation and distribution of literature in the cafeteria and coffee shop might undermine the tranquil atmosphere required in a hospital setting. Certainly, if a customer in a store who is intent on buying merchandise is shielded from disruption of this sort, given the nature of a patient care establishment, there are more compelling reasons why patients and their visitors should be similarly protected. Customers in a retail store or restaurant who are distracted by solicitation or distribution activities are free to leave the premises never to return again. The customer need endure only a few moments of discomfort. In contrast, the patient in a health care facility, at a minimum, usually remains for several days of treatment. Solicitation and distribution activities could thereby upset patients and their visitors for extended periods of time. Furthermore, unsubstantiated or unwarranted statements conveyed in this manner could readily abuse the trust which patients and visitors place in the Hospital. Once a patient has been admitted to a hospital or nursing home, it is unlikely, given his state or health, that he would leave the facility and seek health care elsewhere.

In enforcing the Board's order, the First Circuit expressed the following view:

> This is not to say that the Board does not bear a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized.

NLRB v. Beth Israel Hospital, 554 F. 2d 477 at 481. This method of proceeding may eventually result in the Board's discovering the rule which will properly reflect its duty under the Act, but only at the incalculable cost of actual accomplished harm to a suffering patient. It is the duty of this Court to prevent such experimentation with the

health and well-being of patients which may be jeopardized by union solicitation.

The Board's abandonment of the rule endorsed in *Guyan Valley Hospital, Inc.*, 198 NLRB 107, 81 LRRM 1023 (1972), which recognized a *tendency* to disturb patients as justifying a no-solicitation rule in hospitals is indicative of its lack of expertise in this area. Even more indicative of the Board's inability to formulate rules for application in the area of medical care is its insistence that solicitation for a benevolent organization, such as the United Fund, could be equated to the Union's scurrilous propaganda, asserting that the quality of care at the Hospital is substandard. Moreover, the Board's decision regarding the impact of disturbing activity on "ambulatory" patients is, in light of the total lack of medical corroboration for such a theory and, as in *St. John's,* the absence of any record evidence to support a distinction between the sensibilities of bedridden vis-a-vis ambulatory patients, highly presumptuous. In fact, the lack of expertise of the Board makes somewhat frightening the fact that that body is rendering decisions on matters which have a direct bearing on hospital patients' opportunities for recovery. For example, it is certainly speculative to state that ambulatory patients well enough to frequent public areas of the hospital are "highly unlikely" to be harmed "if they happen to read" "As We See It"; or that, "[p]atients not well enough to be subjected to outside contacts normally stay in their rooms or other immediate patient care areas and will not be exposed to this literature." Visitors and patients exposed to union literature attacking the quality of patient care provided by the Hospital and applauding work stoppages may well become anxious and apprehensive.

In light of the fact that psychiatric outpatients frequent the cafeteria, dressed in street clothes, the Board's

distinction between ambulatory and non-ambulatory patients as a basis for the "immediate patient care area" formula merely serves as an indication that the Board lacks expertise in regard to the operation of health care institutions. In *St. John's* the court found it unreasonable to conclude that the adverse effects of union solicitation will occur in some patient access areas but not in others and that such a distinction involves medical and administrative judgments outside the Board's acknowledged area of expertise. *St. John's* at 11. The decision of the First Circuit approving the Board's policy may be categorized as reluctant at best. That court, operating under the severe constraints of its limited powers of judicial review, noted the need for this Court to provide guidance to the courts below who are, and will be, deciding a large number of similar cases, when it said:

> A non-profit hospital's concern about the possible effect on patients or organizational conduct in parts of the institution can hardly be dismissed as unreasonable when registered at a time when guidelines are still in flux and are in the process of being formulated through administrative and court proceedings.

NLRB v. Beth Israel Hospital, 554 F. 2d 477 at 483.

It is the responsibility of this Court to direct the Board toward implementation of a policy which gives some measure of attention to the rights of patients to beneficial health care. Integral to that policy must be a recognition of the fact that it is the Hospital which possesses the medical expertise required to determine what rules are necessary to preserve the medical well-being of persons under its care. It is the Hospital that has a duty to provide proper health care to its patients. This obligation entails a technical curing function and a human

caring function twenty-four hours a day. The duty of patient care does not terminate once the patient enters the cafeteria or coffee shop, but rather, it is a twenty-four hour a day operation. The primary concern of the Hospital is the care of its patients and under no circumstances may patient care be compromised. The no-solicitation and no-distribution rules are directed to that end. The patient and public areas of the Hospital are all areas used as a part of the service that the Hospital provides for its customers, patients and their visitors. Like the selling *or public areas* of a retail store, the patient and public areas of the Hospital should not "be converted into an arena for the organization of employees" *Marshall Field, supra* at 378.

It is the Hospital that has a duty to provide the therapeutic milieu required to effectuate recovery of its patients. It is the Hospital, not the Union or the Board, that is held answerable, morally and legally, when something goes wrong with the curative and recovery process. And it is the Hospital that possesses the knowledge necessary to perform that function. Promulgation by the Hospital of the rules regarding solicitation and distribution was undertaken in the interest of securing proper recuperative environment for its patients, not out of self-serving anti-Union motivations. This is clearly illustrated by the fact that Petitioner has freely granted access to several adequate and effective areas for solicitation and distribution.

This Court should, therefore, seize upon this opportunity to provide guidelines to the Board and courts which will re-establish that the hospital setting presents a situation where there exists third party rights which must be recognized and accommodated.

Conclusion.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A.

Relevant Statutes.

United States Code, Title 29:

§ 152 — Definitions.

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

• • •

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

§ 157 — Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or

all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158 — Unfair Labor Practices.

(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

• • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

Appendix B.

223 NLRB No. 188

MFJ
D—1048
Boston, Mass.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

Case 1—CA—10200

BETH ISRAEL HOSPITAL
and
MASSACHUSETTS HOSPITAL WORKERS UNION,
LOCAL 880, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

DECISION AND ORDER

On July 25, 1975, Administrative Law Judge Ivar H. Peterson issued the attached Decision in this proceeding. Thereafter, counsel for Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions [2] of the

[1] In sec. II, D, *Discussion and Conclusions*, of the attached Decision, the Administrative Law Judge erred in stating that in *Summit Nursing and Convalescent Home, Inc.*, 196 NLRB 769 (1972), the Board found lawful a rule which prohibited union solicitation on company property even though it was on employees' nonworking time and in nonworking areas. This was the Administrative Law Judge's recommendation, and the Board reversed him.

[2] Subsequent to the Administrative Law Judge's Decision in this case, the Board in *St. John's Hospital and School of Nursing,*

Administrative Law Judge and to adopt his recommended Order as modified herein.

D—1048

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below and hereby orders that Respondent, Beth Israel Hospital, Boston, Massachusetts, its officers, agents, successors, and asigns, shall take the action set forth in the said recommended Order, as so modified.

1. In paragraph 1(a) substitute "in any other manner" for "in any like or related manner."

2. Substitute the following for paragraph 2(d):

"(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Dated, Washington, D.C. Apr. 30, 1976.

NATIONAL LABOR RELATIONS BOARD
Betty Southard Murphy, Chairman
John H. Fanning, Member
Howard Jenkins, Jr., Member

(SEAL)

Inc., 222 NLRB No. 182 (1976), held that restrictions on solicitation and distribution in patient access areas such as cafeterias violates Sec. 8(a)(1) of the Act. Accordingly, the Respondent also violated Sec. 8(a)(1) by maintaining an overly broad no-solicitation, no-distribution rule that prohibited all solicitation and distribution in all areas to which patients and visitors have access and employees have access during nonworking time other than immediate patient care areas.

JD-414-75
Boston, Mass.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

Case No. 1-CA-10200

BETH ISRAEL HOSPITAL, ET AL.
and
MASSACHUSETTS HOSPITAL WORKERS UNION, LOCAL 880, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

Jeanne Baum, Esq., and *Arnold M. Marrow, Esq.*, of Boston, Mass., for the General Counsel.

Jonathan Hiatt, Esq., of Boston, Mass., for the Union.

Robert Chandler, Esq., and *Vernon C. Stoneman, Esq.*, of Boston, Mass., for the Respondent.

DECISION

Statement of the Case

IVAR H. PETERSON, Administrative Law Judge: This case was tried before me in Boston, Massachusetts, on April 24 and 25 based upon the complaint issued by the Regional Director for Region 1 on February 21, later amended, and the answer of Beth Israel Hospital, herein

called the Respondent or the Hospital, dated February 26. The complaint was based upon the charges filed by Massachusetts Hospital Workers' Union, Local 880, Service Employees' International Union, AFL-CIO, herein called the Union, dated October 29, 1974. In its answer, the Respondent admitted certain jurisdictional allegations but denied that it had engaged in any conduct violative of the Act. Briefly stated, the complaint alleged that the Respondent had engaged in conduct violative of Section 8(a)(1) and (3) of the Act, by initiating, promulgating, and maintaining a written rule prohibiting (a) distribution of union literature in the cafeteria and coffee shop of the hospital, and (b) solicitation except on a "one-to-one" basis in the cafeteria and coffee shop. In addition, the complaint alleged that on or about October 25, by its agents, Dr. Mitchell T. Rabkin and Dr. Stephen Robinson, the Respondent issued oral and written warnings to an employee, Ann Schunior, threatening her with dismissal if she continued to distribute literature in the hospital's cafeteria. These warnings, according to the complaint, included an oral warning by Dr. Rabkin on October 25, and a written warning dated the same date, and signed on October 28, by Dr. Rabkin and Dr. Robinson, which threatened Schunior with discharge because she joined or assisted the Union or engaged in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. These acts, it is alleged, as carried out by the Respondent, discriminated with regard to the hire or tenure or terms or conditions of employment of Schunior, thereby discouraging membership in the Union and constituting unfair labor practices within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act. In its answer, as subsequently amended, the Respondent admitted certain jurisdictional allegations but denied that it had engaged in any unfair labor practices.

Upon the entire record in the case,[1] including my observation of the witnesses as they testified, and careful consideration of the briefs filed with me on or about June 10, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent, a Massachusetts corporation, is a nonproprietary hospital in Boston and employs approximately 2200 employees excluding house staff, attending physicians, students, and employees of Harvard University, who work on the premises. It is admitted, and I find, that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. It is further admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. *Preliminary Statement*

Only five witnesses were called in this proceeding. All of them, except Schunior, the alleged discriminatee, and the Director of Personnel Services, Anne Cronin, testified for relatively short periods. The parties cooperated in formulating a substantial number of stipulations which, together with attached material, were introduced into evidence as joint exhibits, thereby facilitating and shortening the hearing considerably.

In May 1970 the Respondent issued a handbook to employees, which was revised in subsequent years, entitled "Working Together." This booklet contained information concerning the hospital and its buildings, information regarding job qualifications, working hours and paydays, and

[1] The unopposed motion of counsel for the General Counsel to correct the transcript of record is hereby granted.

unemployment compensation; it outlined details with respect to salaries, overtime, merit increases, promotions and transfers; in addition, it set forth health and other benefits available to employees, such as vacations, holidays, sick leave, retirement plan, accident insurance, payroll savings plan, lunch and relief periods, parking facilities, and information concerning the cafeteria and coffee shop. It also contained hospital rules and the responsibilities of employees to the hospital with respect to appearance and conduct, confidential information, attendance and punctuality, and the like. A violation of a rule could either result in immediate dismissal or, depending upon the nature of the violation, be considered good and sufficient cause for dismissal. The handbook further stated that it was the general policy of the hospital to give warning prior to dismissal. The rules with which we are here primarily concerned are as follows: (a) Rule 12, which forbade the "collecting money or soliciting for any purpose on Hospital work time without prior official approval of a Division Director"; (b) Rule 13, which forbade "posting notices or distributing literature on Hospital property without prior authorization of a Division Director"; and (c) Rule 17, which forbade "loitering on the premises before and after working hours." On July 23, 1970, Dr. Rabkin issued a newsletter to employees which, among other things, provided that "petitions, discussions, etc., amongst Hospital personnel should be carried out only on a person to person basis at coffee breaks, mealtimes or after the working hours of all those involved." The statement went on to provide that it "should not be interpreted as forbidding ordinary conversations, discussions, etc., which do not interfere with work or the rights of others. Direct confrontation and solicitation of the public, staff and employees through leaflets, etc., must not be done on Hospital property."

According to a decision of the Massachusetts Labor Relations Commission, which was issued October 5, 1973, and will be referred to subsequently, this clarification or modification was necessary "because of anti-war and related protests at that point in time 'which could have caused disruption and upset patients.' " The same newsletter went on to state that "our experience has shown that many patients do become upset when those caring for them display political emblems. Consideration of patients, therefore, indicates that armbands, pins, etc., should not be displayed on patient units." In a newsletter dated March 22, 1973, Dr. Rabkin issued "a simplified restatement of Hospital rules with reference to employees' activities on Hospital premises," which provided that, among other things, "With the exception of the United Fund and Combined Jewish Philanthropies drives, no one may hand out literature or solicit any employee, staff member or member of the public for any purpose on Hospital work time, nor may they do so in patient, visitor or other public areas"; and that employees "are not to loiter on the Hospital premises before or after working hours." According to the newsletter, this "clarification of existing rules is necessary because of the activities of a very few employees who apparently have not been aware of Hospital policy."

B. *Interference, Restraint and Coercion*

On March 26, 1973, an unfair labor practice charge was filed by the Union with the Massachusetts Labor Relations Commission, and, following the October 5 decision and order handed down by the Commission, a special newsletter was issued by Dr. Rabkin, on October 18, containing the following new rules: (a) "Employees may distribute organizational literature during non-working hours, such as lunch periods or coffee breaks, in areas which are only for

employees, such as locker rooms and employee lounges"; (b) in conformance with past policy, "employees may continue to discuss any matter, including unions, during specified non-work times and may engage in such discussions with fellow employees also not at work to enlist support of their particular views in employee-only areas or in areas where patients, visitors and employees not on duty are permitted to congregate and intermingle, such as the cafeteria and coffee shop"; and finally, the Hospital reaffirmed its position "that our employees have the right to engage in or refrain from organizational activities as they see fit within the general Hospital guidelines, and we reemphasize once again that the Hospital will not interfere in any way with the employees' self-organizational rights."

Under date of May 6, 1974, the Boston Hospital Workers Organizing Committee, Service Employees International Union, AFL-CIO, filed another unfair labor practice charge before the Massachusetts Commission, in which it was alleged that some employees were threatened with arrest for distributing union literature in locker rooms. On September 11, a settlement agreement was signed, which, among other things, provided that the hospital would not interfere with the right of employees "to distribute union organizational literature in employee-only areas," or prevent the distribution of union literature "by employees during non-working time in employee-only areas of the hospital" or threaten "to arrest employees who persist in their attempts to distribute union literature on non-working time in employee-only areas of the hospital" or otherwise discipline them for so doing. In a newsletter dated September 19, Dr. Rabkin admitted that on at least one occasion a security guard did violate the hospital's rules in a situation where literature distribution was permitted and, in consequence, the Respondent undertook to reinstruct all of the guards. In

newsletters issued early in July, Dr. Rabkin set forth the solicitation rule which continued in effect until the issuance of the complaint in this proceeding. It provided as follows:

> Hospital employees who want to solicit other employees for the Union or other causes may do so when they are not on their own working times, but only in two well-defined locations of the Hospital:
>
> 1) Employee-only areas — employee locker rooms and certain adjacent rest rooms; and
>
> 2) Cafeteria and coffee shop.
>
> In the locker areas literature may be offered. In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature nor any form of coercion. Elsewhere within the Hospital, including patient-care and other work areas, the lobbies, corridors, elevators, libraries, meeting rooms, etc., there is to be no solicitation nor distribution of literature. Soliciting of patients and visitors is expressly prohibited at all times and places.

On October 25, Schunior, the alleged discriminatee, distributed the union newsletter, "As We See It," while on her lunch hour in the cafeteria. Dr. Rabkin gave her a verbal warning and subsequently a final written warning. It recited that he had observed Schunior "carrying a pile of 'As We See It'" and "walking around from one table to the next offering the newsletter to people sitting at luncheon" and that she "was not engaging in specific one-to-one conversation with any particular individual and then handing over a copy of the newsletter" but, instead, "was table-hopping and offering the newsletter generally to anyone in her immediate vicinity." According to Dr.

Rabkin, Schunior, in response to his statement that she was violating hospital regulations, replied with the inquiry whether he was aware of the fact that NLRB regulations "were different from those of the Massachusetts Labor Relations Commission and that what she was doing was consistent" with Board regulations. An unfair labor practice charge was filed by the Union with the Board, in view of the fact that the Board had recently asserted jurisdiction. Under date of March 5, 1975, the solicitation rule was changed to provide as follows:

> There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to BI employees may be done by other BI employees, when neither individual is on his or her working time, in employee-only areas — employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital, including patient-care and all other work areas, and areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.
>
> Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.
>
> Consistent with long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital.

C. *The Discipline of Schunior*

Schunior, a research technician in the Department of Medicine, had worked at the hospital a little over a year. On her lunch hour on October 25 she distributed union literature. She testified that prior to the election in April,

she had never been in the locker room area but since then she had been in there probably once a week or once every 2 weeks because, as she testified, that was "the only place we can legally distribute *As We See It,* and talk to employees about the Union, and that is what I do there." She testified that she had been in two women's locker rooms and that she had seen nothing posted on the bulletin board in either locker room. Schunior eats lunch in the cafeteria 3 or 4 days a week and, in addition, has coffee there one or two mornings a week before going to work. In the course of her duties she goes through the cafeteria as often as a dozen times a day. She testified that there were many differences between employees and non-employees, and mentioned that many of the employees wear uniforms and most wear name tags. In addition, she added that after working a period, one begins to recognize faces of people one sees daily. On the other hand, visitors do not wear name tags or uniforms and they generally appear unfamiliar with things associated with the cafeteria line. With respect to patients, which are of two kinds, in-patients and out-patients, the former, so she stated, "generally look like patients" and, on occasion, they come into the cafeteria in bedclothes and wear wrist bands. On the other hand, she stated that there was generally no way of distinguishing out-patients from visitors.

On the day that she distributed literature she was in the cafeteria going from table to table handing out the pamphlets. She stated that as a general rule she asked people that she thought were employees if they would like a copy of "As We See It," the union pamphlet. If she thought that the individuals might be visitors, she first asked if they were employees and explained that she was passing out literature for employees. Schunior testified that there was a table in front of the non-official bulletin board which had

been there since she began working, and that on one occasion she saw someone, whom she thought to be an employee, place some literature on the table. As she recalled, this was either at lunch time or perhaps at breakfast time. She observed employees take the literature that had been placed on the table.

The Respondent distributes its newsletter, as well as other literature on occasion, with employee paychecks. Robert Hess, a respiratory therapist who had worked at the hospital over 6 years, testified that travel advertisements were occasionally included with the paychecks and that he "found it somewhat irritating to get a paycheck . . . and then get travel ads for more than the paycheck totaled. In one case there were six of them distributed with the paycheck." Cronin testified that she eats in the cafeteria about 20 percent of the time and that on occasion she is able to distinguish employees from non-employees, but she said that as to a large number she cannot distinguish whether they are Beth Israel employees or employees from other hospitals, students or volunteers. With respect to whether all employees wear hospital name tags, Cronin stated that a large number of employees on occasion forget to wear the tags which, according to her, "is a constant source of concern of many of our department heads, who certainly urge it."

As stated above, Dr. Rabkin orally warned Schunior on October 25, the day she distributed the union pamphlet during her lunch hour, and subsequently she was given a final written warning, which stated that she "continued to violate" the rule "despite several verbal warnings" that she was "in flagrant violation of such rule and admission on your part of your knowledge of the existence of such rule." The notice stated that further violation would result in dismissal.

D. *Discussion and Conclusions*

The record shows that solicitation and distribution rules affecting the cafeteria have been relaxed in certain situations. Thus, during March posters publicizing the hospital's "buck a day" program, a cost reduction effort, were displayed in the cafeteria. A travel brochure rack is situated adjacent to the non-official bulletin board, a car pool board is posted in the same area, and during National Nutrition Week a table was set up in the cafeteria on which was placed literature concerning nutritional ideas for the information of employees, patients and visitors. Moreover, from time to time certain commercial literature has appered on a table underneath the non-official bulletin board, relating to tennis camps, film processing, magazine subscriptions, and insurance applications. As previously noted, since at least 1966, the hospital has permitted solicitation for the United Fund and for the Combined Jewish Philanthropies. These drives are publicized through newsletters accompanying paychecks, and tables have also been set up in the cafeteria for the distribution of pledge cards. Also, there is evidence of similar distribution of newsletters giving information concerning the establishment of a credit union for employees, inviting volunteers to provide medical assistance to Israel to contact a certain organization, and patient information booklets; on occasion, there have been collections within departments for employee gifts on such occasions as weddings, births, and so forth.

Counsel for the hospital, in his brief, lists "a sampling of the content of the union monthly leaflet," including, among other things, a complaint that there was so little linen that patients had to do without, allegations that the chest physical therapy department was understaffed during Sundays and evenings, that patients went without adequate nursing care for several months early in 1974, an

article in the July edition alleging that an employee claimed she was totally ignored during her stay at the hospital as a patient giving birth, an item in the September issue, commenting favorably upon an employee work stoppage in the main kitchen which included an inquiry as to whether the hospital administration really cared about patients and, if so, why were not good signs provided to direct patients out of the hospital and containing also the statement that "when weekend comes as far as dietary bosses are concerned, the patients can go to hell." Counsel for the hospital argues that the distribution of such literature "containing controversial, unsubstantiated statements that compromised the reputation of the hospital as a quality provider of patient care cannot be tolerated by the hospital nor should it be condoned or authorized by the board." Furthermore, he argues that the Board "should not permit a hospital environment to be infected with the virulent vitriolic vituperation which is self-evident in the propaganda" of the Union and maintains that the distribution of such literature would indeed upset patients and visitors whereas the literature, previously referred to, that has been allowed to be distributed, is "clearly noncontroversial innocuous and would not upset patients or patients' visitors."

In her brief, counsel for the General Counsel observes that it is "a delicate task" to weigh and balance conflicting rights such as are here involved where the right of employees to receive information about union organization guaranteed under Section 7 of the Act, and the right of an employer to use his property, are involved. She notes that the present case "is made even more complex by the rights of a third party, the rights of the patient," and that the "herculean task of weighing and measuring" must be approached with a view to arriving at a solution that

"causes the least amount of harm to the greatest number of interests." It is the position of counsel for the General Counsel that the rules of the Respondent "are restrictive because they are overbroad, that they are selectively enforced and that the reasons given for their enforcement are fallacious and deceptive." She then reviews the principal Board and court decisions in this area. In one of the early leading cases, *Peyton Packing Company, Inc.*, 49 NLRB 828 (1943), the Board made the following observations:

> The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.

Subsequent decisions have applied and refined the *Peyton Packing* rule, and the present Board policy may be summarized as follows:

1) A rule forbidding distribution of union literature by employees in working areas is presumptively valid even when applied to working and non-working time.
2) A rule forbidding distribution in non-working areas during non-working time is presumptively invalid.
3) A rule forbidding union solicitation by employees during their non-working time, even though limited to working areas, is presumptively invalid.
4) A rule forbidding union solicitation during working time in any plant area is presumptively valid.
5) A presumption of validity may be overcome if it can be shown that the rule is discriminatory rather than attributable to the right of the employer to protect his legitimate property interests.

For the purposes of this decision, I assume that lunch periods of persons employed in capacities such as Schunior, are paid time.[2]

[2] See the Board's decision in *United Aircraft Corporation (Pratt & Whitney Division)*, 180 NLRB 278 (1969). In my decision in that case, which was adopted by the Board, I referred to decisions such as *Olin Industries* v. *N.L.R.B.*, 191 F. 2d 613 (C.A. 5), enforcing 86 NLRB 203 (1949), where the Board has held, with court approval, that free time, such as for lunch or rest periods, even though paid for, was properly to be regarded and treated as non-working time, during which union solicitation activities might be undertaken. In that case, the court observed that the Board has "properly approached this problem of solicitation on company property on the basis of the distinction between actual and non-working time, rather than on the basis of the immaterial distinction between paid and unpaid time." However, in the *United Aircraft* case I came to the conclusion that the term "working hours" appeared to have been equated with "paid time." Solicitation by non-employee organizers is treated differently; See, for example, *Babcock & Wilcox Co.*, —— U.S. —— (1956) and *Sabine Towing*, 205 NLRB No. 45 (1973).

The Board has dealt with this problem in several cases involving hospitals or nursing homes. Thus, in *Summit Nursing and Convalescent Home*, 196 NLRB 769 (1972), the Board prohibited union solicitation on company property even though it was on the employee's non-working time and in non-working areas. The Board there stated (at page 770) that it was "significant that employees were previously solicited, during working hours and in work areas, for gifts for departing employees, with the Respondent's knowledge," and that one employee engaged in selling dishes while at work with no apparent adverse effects upon the institution's operations. In addition, the Board found no evidence that the distribution of union literature created a litter problem or in any way interfered with the efficient operation of the institution.

In another recent case, *Bellaire General Hospital*, 203 NLRB 1105 (1973), the Board held invalid a rule which prohibited solicitation for a labor organization during nonworking time and the distribution of union literature during non-working time in nonwork areas. In that case, the Board ordered the employer to inform its employees "that they are free to engage in distribution of union literature in nonwork areas of its premises during nonworking time, and to engage in union solicitation on its premises, during nonworking time . . . ." (Page 1111.)

In the third case, *Guyan Valley Hospital, Inc.*, 198 NLRB No. 28 (1972), the Board affirmed the finding of its administrative law judge that a rule that prohibited solicitation in working areas during working hours was valid. In that case, the Board observed that the rule prohibited solicitation only in the "working area" of the hospital, without deciding on what precisely constituted working areas except that the administrative law judge referred to these as hallways, elevators, stairs, patients' rooms, gift shops and so forth.

Counsel for the General Counsel contends that the Respondent's rule, being overbroad, results in restricting the organization rights of employees. In the first place, the contention is made that employees are limited by reason of the rule to solicitation and distribution in the employee-only locker rooms. In this connection, it is noted that lockers are scattered throughout the hospital in some 63 locations, but that it is necessary to distinguish between lockers and locker rooms. Thus, there are only four large locker rooms plus two smaller rooms which in total contain 613 lockers available to employee organizers from all departments. In addition, there are locker areas containing 470 lockers, but available only to employees who are assigned lockers in those areas. In sum, counsel contends that this "simply does not give the 2,200 employees adequate opportunity to receive information from their fellow employees under Section 7." Moreover, some locker areas are quite small, which means that employees assigned space in those areas "could not receive literature there unless one of their members would distribute or solicit." Moreover, it is pointed out that these locker areas are in large part divided into male and female rooms, so that this further restricts their availability to all employees. Finally, counsel for the government notes that the Respondent "does not use the locker rooms to dispense information. There is no bulletin board in one large female locker room and the other female locker room has a bulletin board with nothing posted on it. Publicity concerning the overwhelming BAD campaign . . . was placed in some locker rooms while the rest of the hospital was apparently inundated by publicity."

Counsel for the government argues that the geographical location of the Respondent's hospital, in a busy urban area, and with many doors available for entrance or exit,

demonstrates that employees "may come and go without reaching public property for some distance." Furthermore, it is observed that hospital employees live in widely scattered areas, and that the Respondent has stated that it will not make a list of names and addresses of employees available to the Union unless an election has been ordered.

Counsel for the government further contends that it is an absurdity to restrict solicitation to the cafeteria area. Thus, it is pointed out that solicitation on a one-to-one basis has been underway for some time but, despite this, the Respondent was unable to show any instance of injury to patients. However, the restriction placed by the Respondent limiting solicitation or prohibiting solicitation even in the cafeteria obviously, so the argument runs, constitutes a violation of the Act "particularly since no special circumstances have been shown and no injury has occurred." The cafeteria is open at various hours from 6:30 a.m. to midnight, or a total of 8 hours, not counting the morning coffee break.

In a survey of cafeteria use conducted by the Respondent in conjunction with an anticipated renovation of the cafeteria the observation was made that the cafeteria "is used by outsiders at each meal, of which the most heavy usage is in the evening." It is, of course, obvious that patients using the cafeteria are reasonably ambulatory and, inasmuch as meals are provided on the various floors of the hospital, the percentage of patients using the cafeteria is relatively small. Counsel for the government states that it is not contended "that all non-patient non-work areas should be open to solicitation and distribution" but that, "where, as here, the cafeteria is obviously planned primarily for employees and actual employee use is high it is a violation of Section 7 to prevent employees from soliciting therein."

Pointing out that the Respondent utilizes the cafeteria area for communication with employees, as detailed previously, government counsel argues that it is thus clear that the Respondent "recognizes that the locker rooms are inadequate for distributing and gathering information. The most reasonable way to reach employees is through newsletters and through direct contact in the cafeteria and coffee shop. The Respondent uses both freely, allowing solicitation and distribution of non-commercial and commercial material."

It is additionally contended that further inconsistencies are apparent in the policy of the Respondent. Thus, it is pointed out that newsletters from the General Director are given to employees with their paychecks and that the checks and newsletters are customarily picked up by an individual from each department and then distributed in the department, or work area. Attention is called to the fact that these newsletters have been used for a variety of solicitations: for example, a letter dated October 31, 1974, called attention to the fact that the election ballot would carry a referendum question asking voters whether they approved the reorganization of state agencies that regulate health systems in the Commonwealth, and expressed the opinion that it seemed advisable to vote for reorganization. The newsletter of October 17, 1974, described the credit union and informed employees of a table set up outside the cafeteria at which they could register; the same letter told about the United Fund and suggested payroll deductions. In others, a scheduled meeting to answer questions with respect to the credit union was described and funds were requested for the Israel Emergency Fund.

I concur in the finding of Judge Constantine, approved by the Board, that inasmuch as the Respondent "sanc-

tioned solicitations of various kinds during working hours and approved of suppers prepared during such hours" the Employer's according of "solicitation privileges to non-union matters while withholding them when union activities were involved is disparate treatment forbidden by the Act."[3]

Finally, counsel argues that the contention of the Respondent that it is protecting the rights of patients is a "sham," and that the Respondent "is picking and choosing those activities thought to be noteworthy or in its own interest," observing that the only material "kept away from employees is that calculated to hurt the Respondent." In this regard, counsel notes that in the special newsletter from the general director under date of January 16, 1973 in which it was stated that "union organizers have been urging employees to have a union to represent them," and that it was his view that a union "has no place at Beth Israel Hospital" and that the "disruptive activities of the union organizers demonstrate their lack of true concern for both B.I. patients and employees." Additionally, he observed that "the Union's primary concern today is the thousands of dollars they will gain from employees' dues, dollars to come directly out of your pocket." Regarding the Respondent's stated concern for the well being of patients and visitors, counsel for the General Counsel notes that the January 1975 issue of Beth Israel News, which is distributed to visitors, on the first page, had a red headline entitled "RAPE RAPE" in which it was noted that rape "is the fastest growing violent crime in the United States." The article went on to state that as "a response to the increased incidents of the crime and the recognized needs of the victims, a multi-disciplinary team at the Beth Is-

[3] *Imco Container Company*, 208 NLRB No. 133 at page 13 of the Judge's Decision.

rael Hospital, . . . has organized a rape crisis intervention program."

To summarize, it appears to me that, upon analysis, the record shows that there are relatively few places where employees can congregate or meet on hospital grounds or in the nearby vicinity for the purpose of discussing non-work related matters other than in the cafeteria; secondly, the area in the neighborhood of the hospital is congested and provides no ready access to employees; finally, I am not persuaded that the Respondent has offered any convincing evidence to demonstrate that the rule is needed, either by reason of actual or suspected interference with patients, visitors or non-employees. Thus, I am unable to find that the Respondent has made a sufficient showing of impairment with its principal obligation, namely, the care of patients, to justify the rule. Accordingly, I conclude and find that the rule and its application and enforcement as revealed by this record are violative of the Act. In so finding, I do not mean to suggest that the Respondent is powerless in this situation. It would appear to me that the Respondent, either unilaterally or in conjunction with the representatives of its employees, could devise lawful regulations governing employee activity in this area.

III. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section II above occurring in connection with the Respondent's operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

Upon the basis of the above findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By initiating, promulgating and maintaining a written rule prohibiting distribution of union literature, and union solicitation except on a "one-to-one" basis, in its cafeteria and coffee shop, the Respondent violated Section 8(a)(1) of the Act.

4. By issuing oral and written warnings to its employee, Ann Schunior, threatening her with discharge if she continued to distribute literature in the cafeteria, the Respondent violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices are unfair practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

IV. The Remedy

Having found that Respondent engaged in and is engaging in certain unfair labor practices it will be recommended that it cease and desist therefrom and take certain affirmative action deemed necessary to effectuate the policies of the Act. Having found that Respondent unlawfully initiated, promulgated and maintained a written rule prohibiting distribution of union literature and union solicitation except on a "one-to-one" basis, in its cafeteria and coffee shop, and issued oral and written warn-

ings to an employee, threatening said employee with discharge in the event she continued to distribute literature in the cafeteria, it will be recommended that the Respondent rescind the aforesaid rule, and expunge the written warning to said employee from her personnel record.

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in these proceedings and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[4]

ORDER

Respondent, Beth Israel Hospital, Boston, Massachusetts, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Disciplining employees or otherwise discriminating against them with regard to the tenure of their employment or any other term or condition of employment for engaging in concerted union activities for their mutual aid or protection, or in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Expunge from the personnel record of Ann Schunior the written warning issued to her concerning distribution of union literature in the Respondent's cafeteria.

[4] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations and recommended Order herein shall, as provided by Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Rescind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffee shop.

(c) Post at its place of business in Boston, Massachusetts, copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(d) Notify the Regional Director for Region 1, in writing, within 20 days from the date of receipt of this Decision what steps the Respondent has taken to comply herewith.

Dated at Washington, D. C.

Ivar H. Peterson
/s/ Ivar H. Peterson
Administrative Law Judge

[5] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

FORM NLRB-4727 (9-69) APPENDIX JD-414-75

[Seals Omitted]

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

PERSONNEL DIVISION
MAY 4 1976

After a trial at which all sides had a chance to give evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post this notice and we intend to carry out the Order of the Board and abide by the following:

The Act gives all employees these rights:

To engage in self-organization
To form, join, or help unions
To bargain collectively through representatives of their choosing
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all of these things.

WE WILL NOT do anything that interferes with, restrains, or coerces employees with respect to these rights.

WE WILL NOT discourage membership in Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO, or any other labor organization by discriminating against any of our employees because of their support of the Union and their activities in connection therewith.

WE WILL expunge from the personnel record of Ann Schunior the written warning given her for distributing union literature in the cafeteria.

WE WILL rescind our rule prohibiting distribution of union literature and union solicitation in the cafeteria and coffee shop.

BETH ISRAEL HOSPITAL, ET AL.
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 7th Floor - Bulfinch Building, 15 New Chardon Street, Boston, Massachusetts 02114 (Tel. No. 617 - 223-3300).

Appendix C

United States Court of Appeals for the First Circuit

No. 76-1318

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,
v.
BETH ISRAEL HOSPITAL,
RESPONDENT.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before
COFFIN, *Chief Judge,*
CAMPBELL, *Circuit Judge,*
BOWNES, *District Judge.**

David F. Zorensky, Attorney, with whom John S. Irving, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Carl L. Taylor*, Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel, and *Michael S. Winer*, Attorney, were on brief, for petitioner.
Robert Chandler, with whom *Stoneman, Chandler and Miller*, was on brief, for respondent.

April 29, 1977

CAMPBELL, *Circuit Judge.* Respondent, Beth Israel Hospital, is a major non-profit hospital of national reputation in Boston, Massachusetts. In 1975, the hospital had the following rule:

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* Of the District of New Hampshire, sitting by designation.

"Hospital employees who want to solicit other employees for the Union or other causes may do so when they are not on their own working times, but only in two well-defined locations of the Hospital:
1) Employee-only areas — employee locker rooms and certain adjacent rest rooms; and
2) Cafeteria and coffee shop.

In the locker areas literature may be offered. In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature nor any form of coercion. Elsewhere within the Hospital, including patient-care and other work areas, the lobbies, corridors, elevators, libraries, meeting rooms, etc., there is to be no solicitation nor distribution of literature. Soliciting of patients and visitors is expressly prohibited at all times and places."

While this rule was in effect, an employee, Ann Schunior, distributed a union newsletter in the hospital cafeteria. She was given a verbal warning by a superior and subsequently notified in writing that she would be fired if she persisted in such activities. Charges were thereupon filed by the Massachusetts Hospital Workers' Union, Local 880, Service Employees International Union. The Regional Director of the N.L.R.B. issued a complaint that the promulgation of the hospital's rule against distribution of union literature in the cafeteria and coffee shop, and limiting solicitation there to a one-to-one basis, violated § 8(a)(3) and (1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) and (1). The hospital's warnings to Ms. Schunior were alleged also to violate § 8(a)(3) and (1). While the complaint was pending, the hospital promulgated a new rule flatly banning solicitation and

distribution by employees in the cafeteria and coffee shop and other areas open to the public.[1]

After a hearing on the complaint, the Administrative Law Judge ruled that "[b]y initiating, promulgating and maintaining a written rule prohibiting distribution of union literature, and union solicitation except on a 'one-to-one' basis, in its cafeteria and coffee shop, the Respondent violated Section 8(a)(1)." The ALJ's proposed remedial order required the hospital to rescind its written warning to employee Schunior and "[r]escind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffee shop." The ALJ also proposed a broad order prohibiting discrimination against or discipline of employees "for engaging in concerted union activities for their mutual aid or protection, or in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7."

In a brief memorandum decision, 223 N.L.R.B. No. 188 (1976), a three member panel of the Board affirmed the ALJ's "rulings, findings and conclusions". The Board went on, in its formal order, to adopt the substance of the ALJ's recommended order including that portion requiring the hospital to "[r]escind its written rule prohibiting distribution of union literature and union solicitation in its cafeteria and coffee shop." The Board,

[1] "There is to be no soliciting of the general public (patients, visitors) on Hospital property. Soliciting and the distribution of literature to BI employees may be done by other BI employees, when neither individual is on his or her working time, in employee-only areas — employee locker rooms and certain adjacent rest rooms. Elsewhere within the Hospital, including patient-care and all other work areas, and areas open to the public such as the lobbies, cafeteria and coffee shop, corridors, elevators, gift shop, etc., there is to be no solicitation nor distribution of literature.

"Solicitation or distribution of literature on Hospital property by *non-employees* is expressly prohibited at all times.

"Consistent with long-standing practices, the annual appeal campaigns of the United Fund and of the Combined Jewish Philanthropies for voluntary charitable gifts will continue to be carried out by the Hospital."

however, also appended the following footnote 2 to its decision:

> "Subsequent to the Administrative Law Judge's Decision in this case, the Board in St. John's Hospital and School of Nursing, 222 N.L.R.B. No. 182 (1976), held that restrictions on solicitation and distribution in patient access areas such as cafeterias violates Sec. 8(a)(1) of the Act. Accordingly, the Respondent also violated Sec. 8(a)(1) by maintaining an overly broad no-solicitation, no-distribution rule that prohibited all solicitation and distribution in all areas to which patients and visitors have access and employees have access during nonworking time other than immediate patient care areas." *Id.*, slip op. at 1 n.2.

Resisting the Board's petition for enforcement, Beth Israel argues that curtailing solicitation and distribution in the cafeteria and coffee shop is justified by the special circumstances of a health-care institution. Some of its out-patients and in-patients visit the cafeteria and coffee shop during the day and will, it is contended, be upset by the "table-hopping" and sometimes heated discussions which accompany union solicitation and distribution. The hospital also points out that some of the union literature distributed in the past has been harshly critical of the quality of health care which the hospital provides. Beth Israel suggests that its legitimate desire to prevent such literature from falling into the hands of patients and visitors, and thereby upsetting them, justifies its no-distribution rule.

Beth Israel also challenges the Board's footnoted conclusion that the hospital violated Section 8(a)(1) by maintaining an overly broad rule prohibiting all solicitation and distribution in all areas to which patients and visitors

have access "other than immediate patient care areas". The hospital fears that this footnote will be read as expanding the scope of the Board's decision and order so as to mandate the allowance of organizational activity throughout the hospital in all except the most obvious patient care areas. The hospital maintains that such a reading would result in extreme unfairness to it, by cutting off all future opportunity to show the harmful effects upon patients of organzational activity in other parts of the hospital. The complaint made no reference to areas other than the cafeteria and coffee shop and no evidence as to the effects of union activity in other areas was introduced at the hearing.

Principles governing an employer's limitation of solicitation and distribution by employee union organizers are by now fairly well settled. Rules which prohibit union solicitation on the employer's property during nonworking time in any location have been held to be presumptively unreasonable and discriminatory in the absence of evidence of special circumstances to justify them. *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 804 (1945); *D'Youville Manor* v. *NLRB*, 526 F.2d 3, 5 (1st Cir. 1975); *St. John's Hospital & School of Nursing*, 222 N.L.R.B. No. 182, slip op. at 2, *appeal docketed*, No. 76-1130 (10th Cir. 1976). Rules prohibiting distribution of literature are likewise said to be presumptively invalid if applied during non-working time in non-working areas. *Food Store Employees Local 347* v. *NLRB*, 418 F.2d 1177, 1180 (D.C. Cir. 1969); *IAM District 9* v. *NLRB*, 415 F.2d 113, 115 n.5 (8th Cir. 1969); *NLRB* v. *Orleans Manufacturing Co.*, 412 F.2d 94, 96 (2d Cir. 1969); *Winchester Spinning Corp.* v. *NLRB*, 402 F.2d 299, 303 (5th Cir. 1968); *St. John's Hospital, supra.* In this case, the application of the employer's no-solicitation, no-distribution rules to the cafeteria and coffee shop banned

concerted activities in non-working areas during non-working time. The burden, therefore, was on the hospital to show that special circumstances justified its curtailment of protected activities in these two places.

We are unable to say, on this record, that the Board was compelled to hold that Beth Israel met this burden. The Board views a hospital's "basic function" as the provision of patient care: it has accordingly declined to accept rules cutting back on organizational rights in non-patient care areas unless the hospital shows that the curtailed activity will impinge upon patient care.[2] The hospital argues that solicitation and distribution activities among employees might "offend or upset patients and their visitors" gathered in the cafeteria and coffee shop, but the Board could conclude that such activities in these public areas would not constitute a sufficient threat to the treatment of patients, or to their recovery, to justify depriving employees of their organization rights. There was evidence of very substantial employee use of such areas, and the Board had to weigh the probable effect on ambulatory patients and visitors of employee solicitation and distribution activities in these natural gathering areas against the harm to employees of a ban. Beth

[2] The Board in *St. John's Hospital & School of Nursing*, 222 N.L.R.B. No. 182, slip op. at 4 n.3, *appeal docketed*, No. 76-1130 (10th Cir. 1976), indicated that it would focus only on the employer's "basic function" in assessing the validity of the proferred justfication for curtailing employees' concerted activities. Since a hospital's patient care function is believed not to be impaired by organizational activities in cafeterias and like areas, the Board refused to apply to hospitals its precedents upholding no-solicitation rules when applied to non-working-time activities of employees in department store sales floors and lunchrooms. *E.g., Goldblatt Bros., Inc.*, 77 N.L.R.B. 1262, 1263-64 (1948); *May Dept. Stores Co.*, 59 N.L.R.B. 976, 981 (1944), *enforced*, 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725 (1946). While reasonable minds might differ as to the validity of such a distinction, we cannot say that the Board acted irrationally in viewing hospital cafeterias differently, given the different factors affecting the different sorts of institutions, their employees, and their clientele. We owe deference to the Board's application of the Act to the varying circumstances of employer-employee relations. *See NLRB* v. *Pipefitters Local 638*, 45 U.S.L.W. 4144, 4149 (U.S., Feb. 22, 1977); *NLRB* v. *Truck Drivers Local 449*, 353 U.S. 87, 96 (1957).

Israel asserts that patients witnessing "table-hopping" and heated pro- and anti-union discussions will be subject to anxiety as they worry about "the security of their environment." But this assumes that irresponsible behavior will be the norm, and gives no weight to the fact that only ambulatory patients visit the cafeteria and coffee shop. We think the Board was entitled to reject this line of argument as unduly speculative.[3] This is not to say that the Board does not bear a heavy continuing responsibility to review its policies concerning organizational activities in various parts of hospitals. Hospitals carry on a public function of the utmost seriousness and importance. They give rise to unique considerations that do not apply in the industrial settings with which the Board is more familiar. The Board should stand ready to revise its rulings if future experience demonstrates that the well-being of patients is in fact jeopardized. *See St. John's Hospital, supra*, slip op. at 3-4 (ban valid in "patient care areas" where greater likelihood of upsetting ill patients can be shown).

Beth Israel argues that its no-distribution rule will prevent the union's "scurrilous" attacks on the hospital's health care from falling into the hands of patients or visitors. There was no evidence, however, that literature, offensive or otherwise, was distributed to patients or visitors. Employee Schunior testified that she took care to distribute only to employees. If in the future employee organizers deliberately distribute "scurrilous" literature

[3] The Board's conclusion that the hospital had not carried its burden of showing special circumstances receives further support from the ALJ's supported finding that numerous non-union distribution activities have been routinely permitted in the cafeteria and coffee shop. *William L. Bonnell Co.* v. *NLRB*, 405 F.2d 593, 595 (5th Cir. 1969); *NLRB* v. *Electro Plastic Fabrics, Inc.*, 381 F.2d 374, 376 (4th Cir. 1967). *See Schwarzenbach-Huber Co.* v. *NLRB*, 408 F.2d 236, 256 (2d Cir.), *cert. denied*, 396 U.S. 960 (1969).

to patients or visitors, the hospital may well have cause to discipline such employees. *Cf. NLRB* v. *Local 1229, IBEW* (*Jefferson Standard Broadcasting Co.*), 346 U.S. 464 (1953). In any event, the hospital cannot justify a rule prohibiting distribution to employees of all types of literature on the ground that some of the literature may be scurrilous. Such an argument might at most justify a rule directed at offensive literature. We conclude that the Board did not err in finding that the hospital had not justified its no-solicitation, no-distribution rule as it related to the cafeteria and coffee shop.

We have much more sympathy with Beth Israel's criticism of the Board's finding, appearing in footnote 2 of its decision, of a § 8(a)(1) violation founded upon the rule's applicability to all other non-patient-care areas. Footnote 2 can be read in several ways. Arguably, it merely cites *St. John's Hospital, supra,* as additional authority for finding invalid an "overly broad" rule which outlaws solicitation and distribution in areas "such as cafeterias." Such a reading of the footnote is consistent with the rest of the Board's decision and order which applies only to the particular areas focused on by the ALJ, i.e., the cafeteria and coffee shop. On the other hand, the footnote can also be interpreted as a binding determination that solicitation and distribution must be permitted, without limitation, in "all areas . . . other than immediate patient care areas." Such is the interpretation urged on us by the Board's counsel in seeking enforcement of the order in this case.

Without any facts in the record pertaining to the appropriateness of solicitation and distribution restrictions in areas other than the cafeteria and coffee shop, or any indication that the Board was focusing on other areas, we are unwilling to give such a broad interpretation to

its puzzling footnote.[4] Counsel's post hoc rationalizations cannot serve to fill a critical gap in the record. *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 443-44 (1965). Moreover, the Board did not clarify or expand the ALJ's proposed order which, given the narrow focus of his decision, could not have been intended to apply outside the cafeteria and coffee shop. We are also constrained to give a narrow reading to the Board's decision and order in view of the fact that the Board has only recently been given jurisdiction over non-profit hospitals. The law affecting solicitation and distribution in these hospitals is still largely undeveloped and we think that it would be particularly inappropriate for the Board to be adjudicating patients', hospitals' and employees' rights in as cursory a fashion as would be indicated by giving a broad reading to footnote 2 in this case.

We thus make plain that we interpret the Board's decision and order as adjudicating no more than the status

[4] The Board argues that Beth Israel itself put in issue all non-patient-care areas and therefore should not be heard to argue that the Board improperly determined the rule's legality in all such areas. We understand Beth Israel at most to have argued that it, *qua* hospital, had the right to ban all solicitation and distribution on its premises. While this argument obviously goes too far, we do not see it as inviting the Board, in one fell swoop, to adjudicate the status of all other areas even though the record contained no information pertaining to these other areas. Nowhere other than in the ambiguous footnote does the Board indicate that it focused on the rule's application to particular non-patient-care areas beyond the cafeteria and coffee shop.

The Board also argues that if it improperly expanded the scope of its inquiry to invalidate the rule in all non-patient-care areas, Beth Israel waived its right to raise this issue on appeal by failing to petition the Board for reconsideration of its decision. *See* § 10(e), 29 U.S.C. § 160(e); *ILGWU* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). If the Board's footnoted addition to its decision were unambiguous, this procedural argument might have merit. However, we do not believe the language of the footnote would have put the hospital on notice that the decision was to be read as adjudicating the status of all non-patient-care areas. One would scarcely expect the Board to use a footnote to make a binding ruling of this nature. This broad interpretation of the footnote apparently first came to Beth Israel's attention when an ALJ in another proceeding pronounced himself bound by the Board's footnote to hold that the no-solicitation, no-distribution rule was invalid in all public areas. Since footnote 2 did not give the hospital fair warning that its decision would be construed as an adjudication binding Beth Israel with respect to all non-patient-care areas in its hospital, we reject the Board's argument that § 10(e) prevents the hospital from arguing here that a narrow reading should be given to footnote 2.

of the cafeteria and coffee shop. The order proposed by the ALJ and adopted by the Board required the hospital to "[r]escind its written rule prohibiting distribution of union literature and union solicitation in its cafetera and coffee shop." We think this fairly obviously was intended to regulate only the two mentioned areas. To avoid any question we shall enforce that order only as amended to read, "[r]escind *that part of* its written rule prohibiting distribution . . . [etc.]".[5] In so doing we in no way suggest that union activity may properly be banned in other public areas. It may well turn out that a rule banning distribution and solicitation is likewise invalid in many other non-patient-care areas accessible to patients and visitors as well as employees. But we think that the hospital should not be foreclosed from demonstrating that special circumstances justify a different result elsewhere.[6] Since we refuse to enforce the order in areas other than the cafeteria and coffee shop, the hospital is not collaterally estopped from litigating the propriety of the rule in other areas. *See W. W. Windle Co.* v. *Commissioner,* No. 76-1249 (1st Cir. Jan. 21, 1977), slip op. at 6-7, and the authority therein cited. *See also Martin* v. *Henley,* 452 F.2d 295, 300 (9th Cir. 1971); *International Refugee Organization* v. *Republic S.S. Corp.*, 189 F.2d 858, 862 (1951).

Finally, we decline to enforce paragraph 1 of the Board's order which broadly prohibits interference with "concerted union activities" and "the exercise of [employees'] rights guaranteed in Section 7 of the Act."[7] A non-profit

[5] The "notice to employees" ordered by the Board to be posted should also be reworded to reflect this clarification of the order.

[6] We would add that a phrase like "immediate patient-care areas" is far from self-defining given the complexity of a major metropolitan hospital. Would a waiting area by the nurse's desk on a floor where patients reside be a "patient-care area?" Would the waiting room in the emergency ward?

[7] The Board made the order even broader than the ALJ proposed by substituting "in any other manner" for "in any like or related manner".

hospital's concern about the possible effect on patients of organizational conduct in parts of the institution can hardly be dismissed as unreasonable when registered at a time when guidelines are still in flux and are in the process of being formulated through administrative and court proceedings. We do not think it can reasonably be inferred from a single violation of this character that the hospital has a proclivity knowningly to violate the Act, thus justifying a broad order. *See NLRB* v. *Curtis Manufacturing Co.*, 421 F.2d 1335, 1337 (5th Cir. 1970); *J.P. Stevens & Co.* v. *NLRB,* 417 F.2d 533, 539 n.11 (5th Cir. 1969); *NLRB* v. *Ochoa Fertilizer Co.*, 283 F.2d 26, 30 (1st Cir. 1960) (citing cases), *rev'd on other grounds,* 368 U.S. 318, 400, 401 (1961). The Supreme Court has held that an isolated violation of the Act "does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged." *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 433 (1941). *See also General Motors Co.* v. *NLRB,* 512 F.2d 447, 448 (6th Cir. 1975); *NLRB* v. *Curtis Manufacturing Co., supra*; *NLRB* v. *Richards,* 265 F.2d 855, 861 (3d Cir. 1969). *See NLRB* v. *Kingwood Mining Co.*, 404 F.2d 348 (4th Cir. 1968); *NLRB* v. *Scherer & Sons, Inc.*, 370 F.2d 12, 13 (5th Cir.), *cert. denied,* 389 U.S. 836 (1967).

Except as indicated above, the Board's order will be enforced.

So ordered.

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